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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HOWARD L. BEYER, Superintendent, and
W. CARY EDWARDS, Attorney General of New Jersey,

Petitioners,

v.

LAWRENCE L. SIMMONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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May 11, 1995

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

QUESTIONS PRESENTED FOR REVIEW

1. Whether *Griffith v. Kentucky*, 479 U.S. 314 (1987) compels retroactive application of *Batson v. Kentucky*, 476 U.S. 79 (1986) to state *nunc pro tunc* appeals of a 1977 conviction resulting from prior federal collateral attack, involving a defendant who is a "chance beneficiary" of *Batson*, where without a delay in the appellate process and loss of the jury selection stenographic notes, there could not have been a claim under *Batson*?

2. Whether a federal court of appeals reviewing the denial of an application for habeas corpus relief is barred from review of a state court decision claim resting on state substantive and procedural law grounds under the "adequate and independent" state ground doctrine where an analogous federal constitutional claim exists?

3. Whether the burden of making a *prima facie* showing under *Batson v. Kentucky*, 476 U.S. 79 (1986) does not have to be borne by a defendant on federal collateral attack on a pre-*Batson* conviction, and may be presumed, where the stenographic notes of jury selection were lost prior to the raising of a *Batson* claim?

LIST OF PARTIES

All parties are parties to this petition.

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IN THE
SUPREME COURT OF THE UNITED STATES
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No. _____

HOWARD L. BEYER, Superintendent, and
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LAWRENCE L. SIMMONS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Howard L. Beyer, Superintendent, New Jersey State Prison, and W. Cary Edwards, Attorney General of the State of New Jersey, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on January 4, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 44 *F.*3d 1160 (3d Cir. 1995), and is reprinted as Appendix A, p. 1a *infra.*

The order of the United States Court of Appeals for the Third Circuit with opinion dissenting from the order denying rehearing in banc, is reported at 44 *F.*3d 1176 (3d Cir. 1995), and is reprinted as Appendix B, p. 37a, *infra.*

The opinion of the United States District Court, District of New Jersey, is reported at 796 *F.Supp.* 777 (D.N.J. 1992), and is reprinted as Appendix E, p. 47a *infra.*

The opinion of the Superior Court of New Jersey, Appellate Division, has not been reported and is reprinted as Appendix H, p.92a, *infra.*

The opinion of the United States District Court, District of New Jersey, is reported at 689 *F.Supp.* 432 (D.N.J. 1988), and is reprinted as Appendix K, p.175a, *infra.*

JURISDICTION

On January 4, 1995, the United States Court of Appeals for the Third Circuit filed its opinion and entered its judgment reversing the district court's denial of a writ of habeas corpus. The jurisdiction of this Court to review

the judgment of the United States Court of Appeals for the Third Circuit is invoked under 28 U.S.C. sec. 1254(1).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV, SEC.1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In this case, a federal court of appeals, in ultimately reversing the district court's denial of this state prisoner's application for writ of habeas corpus relief from his 1977 murder conviction, determined that *Griffith v. Kentucky*, 479 *U.S.* 314 (1987) mandated retroactive application of *Batson v. Kentucky*, 476 *U.S.* 79 (1986) on this federal review of this "chance beneficiary's" state appeal *nunc pro tunc* resulting from prior federal collateral attack, and determined that habeas relief was required as respondent's *Batson* claim eludes review because the delay in his direct appeal resulted in the loss of the jury *voir dire* transcripts

and that his speedy appeal claim satisfied the prejudice requirement of *Batson* because the delay impaired appellate review of his *Batson* claim.

The undisputed facts developed at the state court trial, are thoroughly set forth in detailed account in the opinion of the Superior Court of New Jersey, Appellate Division (App.H, at pp. 109a-122a), and reiterated by the United States District Court for the District of New Jersey (App. E, at pp. 51a-65a), and can be briefly stated.

On May 27, 1977 at approximately 1:30 a.m. the respondent herein, Lawrence L. Simmons, together with Donald Phillips and David Wilson, left Phillips' apartment on East 23rd Street in Paterson, intent upon stealing a car to use in a holdup. Phillips was carrying a length of corrugated pipe, which would be used to break into the car if their master key did not suffice to unlock the vehicle. However, they abandoned this plan upon spotting Dr. David Doktor, who was descending the front stairs of his home on 14th Avenue near 27th Street in response to an emergency call at a nearby hospital. As Wilson watched, the respondent and then Phillips set upon the unsuspecting physician, whom they viciously struck down and dragged into the street. As their elderly victim vainly tried to defend himself, respondent and Phillips punched the physician over and over in his face and body. Phillips then grabbed a piece of plastic from his back pocket, wrapped it around his hands and rained repeated blows on the doctor's head with the corrugated pipe, shattering his victim's skull, while respondent unceasingly beat the aged physician and, as a final indignity, kicked his victim in the head.

Respondent then grabbed the doctor's back pants pocket and literally ripped it off, taking the doctor's wallet. The three men then fled, discarding the pipe, plastic and respondent's plaid jacket en route and leaving the unconscious physician, slowly bleeding to death, lying in the roadway.

Upon reaching the corner of 14th Avenue and 23rd Street, the three entered the School 13 playground and discovered that the doctor's wallet contained no money.

The trio subsequently spotted George Marshall, who was on his way home, coming through the playground. The three men walked up 23rd Street, passed Mr. Marshall, and then turned around. The respondent and Phillips followed Marshall across the street to the corner of 23rd Street and 14th Avenue, while Wilson stood on the schoolyard side of 23rd Street. Phillips approached Mr. Marshall, demanded money and when none was forthcoming, punched Marshall in the eye. Marshall grabbed Phillips and threw his assailant against the fence. At this point, the respondent came up behind Marshall and ripped his pocket off, taking Mr. Marshall's wallet and two dollars it contained. Mr. Marshall turned around and looked at respondent, who then beat up Marshall.

Respondent was charged on June 7, 1977 in Passaic County Indictment No. 737-77, along with Donald Phillips and David Wilson, with the murder of David Doktor, in violation of N.J.S.A. 2A:113-1 (Count One), murder while armed, in violation of N.J.S.A. 2A:151-5 (Count Two), and conspiracy to commit robbery, in violation of N.J.S.A.

2A:98-1 (Count Three). (1A 1-2; 1SA 1-2). On August 7, 1977, respondent and Donald Phillips were also charged in Passaic County Indictment No. 970-77 with the robbery of George Marshall, in violation of N.J.S.A. 2A:141-1 (1A3; 1SA 3).

Jury selection was conducted from October 11, 1977, to October 20, 1977 before the Honorable Bruno L. Leopizzi, J.S.C. After the competition of jury selection, due to the emergency hospitalization of Judge Leopizzi, the case was reassigned to the Honorable William J. Marchese, J.S.C. After an eleven day trial, from October 21 to November 8, 1977, the jury found respondent guilty on all counts of both Indictments. Respondent was sentenced on December 21, 1977 on both indictments to an aggregate term of life imprisonment plus 21 to 25 years. (1A4-8; 1SA 4-8).

No Notice of Appeal was filed on respondent's behalf within the 45 day time limitation. From March 13, 1978 to February 11, 1980, respondent engaged in correspondence with his trial counsel and the New Jersey Office of the Public Defender, Appellate Section, regarding the status of his appeal (1SA 9 to 18) and discovered that no appeal was ever filed. (1SA 19-27).

From March 24, 1980 through June 7, 1982, respondent engaged in petitioning the federal courts for a writ of habeas corpus, which was denied for failure to exhaust state remedies, and unsuccessfully appealing therefrom. (See, App. Q, R, S).

On July 12, 1982, respondent petitioned for post-conviction relief in the state trial court. (2SA 228-31). On July 7, 1983, the trial court denied State collateral relief for leave to appeal *nunc pro tunc*, which it was without jurisdiction to grant. (App. P.).

On August 1, 1983, designated counsel for the first time sought before the Appellate Division for leave to appeal *nunc pro tunc*. (3SA237-40). On or about August 17, 1983, the Office of the Public Defender, Appellate Section, filed a Notice of Appeal and transcript requests from the July 7th denial of post conviction relief on respondent's behalf (3SA 286-88; 3SA 232,236); by documents of September 15, 1983 that Office filed an amended Notice of Appeal from the underlying convictions on Indictment Nos. 737-77 and 970-77, without seeking leave to file an out-of-time appeal nor referring to the order denying post-conviction relief. By Order of September 27, 1983, the Appellate Division denied respondent's motion to file a notice of appeal *nunc pro tunc* and dismissed the appeal as untimely. (3SA 294). On October 25, 1983, the defense motion for reconsideration of the motion to file a notice of appeal *nunc pro tunc* was denied. (3SA 302).

By Order entered on November 9, 1984, the Supreme Court denied respondent's Petition for Certification and dismissed the appeal. (3SA 365).

A year and a half later, on May 9, 1986, respondent submitted a *pro se* motion with the Superior Court of New Jersey, Appellate Division, for leave to file a Notice of Appeal *nunc pro tunc*. (3SA 366-85). By Order entered on

August 13, 1986, the state appellate court denied respondent's application. (4SA 425).

Thereafter, on or about October 27, 1986, respondent filed another *pro se* Petition for Writ of Habeas Corpus with the federal district court. (4SA 426-37). By Order of July 5, 1988, the Honorable Dickinson R. Debevoise, U.S.D.J., for the reasons expressed in his decision of that date, *Simmons v. Beyer*, 689 *F.Supp.* 432 (D.N.J. 1988), issued a conditional writ of habeas corpus. (App. I). By Order entered on July 28, 1988, the Court amended its prior July 5th Order to permit reconstruction of the record. (4SA 516-18; 1A 104-06).

Although having been previously advised by the Supervisor of Official Court Reporters, Passaic County, that the Court Reporter notes of respondent's 1977 trial could not be found. (4SA 459), an independent search of the missing Court Reporters' notes was instituted on August 10, 1988 by the Passaic County Prosecutor's Office, which culminated in the discovery of the court reporters' notes for the following trial dates in the matter of *State v. Lawrence Simmons*, Passaic County Indictment Nos. 737-77 and 970-77; October 21, 24, 25, 27, 28, 31, and November 1, 2, 3, 4, 7, and 8, 1977. (4SA 567-71). Theses notes were transcribed on an expedited basis and thereafter served upon the parties and the courts. (4SA 572-78).

By Order entered on August 30, 1988, the Appellate Division granted the application for leave to appeal *nunc pro tunc* and for a limited remand to reconstruct the record,

primarily the jury selection record which was lost or destroyed. (1A 194; 5SA 602).

Reconstruction hearings were commenced on September 21, 1988 before the Honorable William J. Marchese, J.S.C. in the morning. (9A 2413-50), and the Honorable Bruno L. Leopizzi, J.S.C. in the afternoon. (9A 2430). Subsequently, two further reconstruction hearings were held before the Honorable Bruno L. Leopizzi, J.S.C. on September 29, 1988, (10A 2531-73; 5SA 605-73), and October 4, 1988. (10A2570-73).

Thereafter, the trial courts' Certified Statements and Exhibits in reference to the reconstruction of the record, along with court minutes, files, notes, documents and appendices marked into Evidence and all transcripts of the reconstruction hearings, were filed with the Superior Court of New Jersey, Appellate Division on October 4, 1988. (1A 9-17; 1A 107-83; 5SA 580-601; 5SA 605-98).

The reconstruction record discloses that selection in this case began on October 12, 1977 and concluded on October 20, 1977 before the Honorable Bruno L. Leopizzi, J.S.C. As the trial of the co-defendant Phillips ended two weeks previously and the victim was a Paterson physician popular in the community, there was concern by the Court and counsel as to any potential pretrial publicity problem. There were also concerns about any potential racial prejudice or bias held by potential jurors, as the victim was white and respondent is black, as well as whether potential jurors knew, or were patients of, the victim and whether potential jurors were familiar with the crime area.

Accordingly, an individual juror *voir dire* was conducted in chambers; after the trial court questioned each potential juror as per its three page, typewritten list of general questions and the handwritten nineteen questions submitted by defense counsel, counsel were given the opportunity to ask further questions of each potential juror. After this questioning, the potential juror was sent back into the courtroom while discussion ensued concerning any possible problems arising from the responses received and possible further areas of questioning.

At the beginning of jury selection, the prosecution had twelve peremptory challenges and the defense had twenty peremptory challenges. Near the end of jury selection one identified juror, Mark Keown, found to be satisfactory to counsel could no longer serve; the court excused this juror for cause and granted the prosecution one additional peremptory challenge and two additional challenges for the defense. All peremptory challenges were utilized by both parties.

The trial court's handwritten jury selection notes list the names of 124 men and women, from five different venire panels, who were individually *voir dired in camera* by the Court and counsel. In addition to the three identified male prospective jurors known to have been excused for cause, another unidentified 72 potential jurors ultimately were excused for cause after their individual questioning. The record does not reveal the identity of which 35 persons were peremptorily challenged, nor by which party, nor the race of any of the potential jurors who were peremptorily challenged or excused for causes.

The names, occupations and addresses of the fourteen jurors selected to hear the case are specified in the record; four of those jurors are male and ten jurors are female. Of the four male jurors, the record reveals that Juror #2 — who ultimately became the foreman of the deliberating jury after Juror #1, a male, and Juror #7, a female, were selected as alternates — was the only black male on the jury. The record does not reveal the racial composition of the ten female jurors, with the exception of Juror #6, who was white and one of the deliberating jurors.

The only reference in the entire record concerning the existence or basis of any mistrial motion regarding the prosecutor's use of peremptory challenges is contained in the 1977 file notes of Judge Marchese, who was not personally involved in the jury selection; paragraph six of these notes states: "Defense motion for mistrial charging State with systematically excluding blacks from jury. Leopizzi denied." However, the 1977 trial notes and files of Judge Leopizzi, who presided over the individual, *in camera* jury selection, does not contain any reference to any such defense motion during the 1977 trial. Neither the jury selection judge nor either counsel had any independent recollection of such a motion, nor did the notes or trial files of both counsel disclose the existence or basis of any such motion.

On October 5, 1988, respondent filed a motion in federal district court, challenging the sufficiency of the reconstructed record; on November 14, 1988, the Honorable Dickinson R. Debevoise, U.S.D.J. denied this motion without prejudice. (1A195-200).

On January 19, 1989, respondent moved before the Superior Court of New Jersey, Appellate Division for a limited remand to the trial court to move for a new trial on the ground of newly discovered evidence, based on the affidavits of David Wilson recanting his testimony at respondent's 1977 trial. (5SA713-63; 1A206-23), which was granted by Order entered February 14, 1989. Evidentiary hearings were held before the Honorable William J. Marchese, J.S.C. on April 3 and 4, 1989. (10A2574-2719; 10A2720-2970). In an oral decision on April 6, 1989, the state trial court denied respondent's motion for a new trial (10A2971-87), and an Order to this effect was entered on April 10, 1989. (1A204-05). Thereafter, respondent filed an Amended Notice of Appeal to include an appeal from this Order. (2A319).

On July 13, 1990, the Superior Court of New Jersey, Appellate Division, affirmed respondent's murder and related convictions. (App. H). Emphasizing that this state appeal was granted *nunc pro tunc*, the court rejected respondent's claim that the delay in furnishing transcripts violated his due process right to a speedy appeal, *(Id.* at p. 149a), and his claim that the loss or destruction of the stenographic notes of the jury *voir dire* deprived him of a meaningful appeal on the reconstructed jury selection record because it effectively precluded him from arguing whether the trial prosecutor used peremptory challenges to improperly exclude blacks from his 1977 jury. The State appellate court held that this latter argument, relying upon *State v. Gilmore*, 103 *N.J.* 508, 511 *A.*2d 1150 (1986), "must of necessity fail" as "attempting a retroactive application of *Gilmore* under the procedural history and circumstances of

this case. *Gilmore* and *State v. Watkins*, 114 *N.J.* 259 [553 *A.*2d 1344] (1989) foreclose this issue on this 'now for then' appeal." (*Id.* at p 138a). The court concluded that *Gilmore* specifically limited its retroactive effect, and further stated that as a threshold requirement the respondent must timely object to the prosecutor's use of peremptory challenges during or at the end of jury selection but before the jury is sworn. (*Id.* at p. 147a).

Moreover, the State appellate court, further finding that it had "entered an order on September 27, 1983 denying the motion to file the appeal *nunc pro tunc* and dismissing the appeal as untimely," explained that "[a]lthough the court did not state a reason for the denial in the order, we may presume it was dismissed because it was considered filed beyond a reasonable time" and determined that "[n]ot only was the motion long out of time under the [New Jersey court] rules, but it also came after a post-conviction relief application and [federal] *habeas corpus* proceedings." (*Id.*, at p. 100a).[1]

Thereafter, the Supreme Court of New Jersey denied respondent's petition for certification. (App. G), and respondent's petition for *certiorari* was denied by the Supreme Court of the United States on April 1, 1991. (App. F). Meanwhile, respondent moved to reopen his

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[1]Respondent also raised myriad other claims, including those contentions going to the issue of respondent's guilt, in the Appellate Division and in succeeding proceedings. The state courts rejected all these contentions, as did the federal district court and the court of appeals.

petition for *habeas corpus* relief before the federal district court, which was summarily granted by the Honorable Dickinson R. Debevoise, U.S.D.J. on November 14, 1990. (3A602-03).

By opinion and order filed on June 24, 1992, the Honorable Dickinson R. Debevoise, U.S.D.J., dismissed the petition without issuance of a certificate of probable cause. (App. E). The federal district court explained that application of the federalism principle expressed in *Wainwright v. Sykes*, 433 *U.S.* 72, 81 (1977) "excluded from consideration any questions of state substantive law, and thus effectively barred federal habeas review where questions of that sort are either the only ones raised... or are in themselves dispositive of [the] case." (*Id.*, at p. 76a). Accordingly, the district court determined that "[t]he [state] appellate court's conclusion regarding the [respondent's] *Gilmore* claim was clearly based upon that court's interpretation of state substantive law. Moreover, it was dispositive of the [respondent's] claim. Consequently, it is not reviewable in the [respondent's] federal habeas proceeding." (*Id.*, at pp. 76a-77a).

The district court also was "satisfied that the record furnished by the state was sufficient to give [respondent] an effective appeal to the appellate courts." (*Id.*, at p. 78a), and concluded that, "[a]s evidenced by the opinion of the [state] appellate court, [respondent] has been accorded a meaningful appeal in the state courts. Consequently, the due process violation alluded to in [the district court's 1988] earlier opinion has been cured." (*Id.*).

On appeal, the court of appeals reversed the district court. As a preliminary question the court, relying on *Griffith v. Kentucky*, 479 *U.S.* 314 (1987), concluded that *Batson v. Kentucky*, 476 *U.S.* 79 (1986) applied to this case. (App. A, at p. 6a). The Third Circuit determined that respondent's "1977 conviction did not become final until 1991"as respondent's "first appeal as of right was the critical missing step, and his intervening applications for collateral review did not render his conviction final." (*Id.*). The court acknowledged "[t]he irony... that the egregious delay in granting [respondent] a direct appeal inadvertently gave him the benefit of the *Batson* decision. Had [respondent] received a timely review, his conviction would have been final before 1986. In a sense, he is a 'chance beneficiary' of the *Batson* rule." (*Id.*).

The court of appeals also concluded, as a preliminary matter, that respondent's *Batson* claim was not barred under the "adequate and independent state ground" doctrine. (*Id.*, at pp. 9a-11a). The court determined that, pursuant to *Coleman v. Thompson*, 501 *U.S.* 722, 729 (1991), the state appellate court's decision as to respondent's *Gilmore* claim, although independent, was not adequate to support its judgment. (*Id.*).

The Third Circuit found, based upon the reconstructed record of the 1977 jury selection, that respondent's *Batson* claim was preserved for review. (*Id.*, at pp. 11a-12). The court determined that respondent's "*Batson* claim simply cannot be reviewed without a transcript of the voir dire.... We do not and cannot know whether [respondent's 1977] jury selection process was

infected by racial discrimination." (*Id.*, at p. 16a). Nevertheless, the majority determined that respondent established a *prima facie* showing of *Batson* violation from the reconstructed record. (*Id.*, at pp.13a-15a).

Acknowledging that "[a]lthough the Supreme Court has not explicitly recognized a criminal defendant's right to a speedy appeal," (*Id.*, at p. 18a), the court applied a modified, tripartite version of the speedy trial standard of *Barker v. Wingo*, 407 *U.S.* 514 (1972) in concluding that "the 13-year appellate delay violated [respondent's] right to due process and a speedy appeal." (*Id.*, at p. 21a). The court of appeals "concluded that [respondent] is entitled to [habeas] relief for both his potentially meritorious, but unreviewable, *Batson* claim and his speedy appeal claim," and considered "[t]he two violations... intertwined: [respondent's] *Batson* claim eludes review because the delay in his direct appeal resulted in the loss or destruction of the voir dire transcripts, and his speedy appeal claim satisfies the prejudice requirement because the delay impaired appellate review of his *Batson* claim." (*Id.*, at pp. 22a-23a).

Accordingly, the court of appeals reversed and remanded to the district court with instructions "to grant [respondent's] petition for a writ of habeas corpus, give the state an opportunity to retry [respondent], and specify the time period within which the state must retry or release him." (*Id.*, at p. 25a).

Concurring in the result, the the Honorable Dickinson R. Debevoise, U.S.D.J., noting that "[t]he precise retroactivity problem this case presents... has never been

directly before us or the Supreme Court," (*Id.*, at p. 26a), clearly recognized "that *Batson's* retroactive application to this collateral attack on [respondent's] pre-*Batson* conviction is essential to our mandate requiring New Jersey to grant [respondent] a new trial... or release him." (*Id.*, at p. 30a).

On February 10, 1995 the court of appeals denied the State's motion for rehearing and rehearing in banc by Order Sur Petition for Rehearing, together with a dissenting opinion filed by Circuit Judge Greenberg and joined by Circuit Judge Alito. (App. B). On March 14, pursuant to Federal Rule of Appellate Procedure 41(b), the Court of Appeals stayed issuance of the certified judgment in lieu of formal mandate until March 20, 1995 and on April 7, 1995 again stayed issuance of the mandate until May 12, 1995, with the stay to continue until final disposition by this Court if the petition is file on or by May 12, 1995. (App. C, D).

REASONS FOR GRANTING THE WRIT

A. THE THIRD CIRCUIT DECISION APPLYING *GRIFFITH V. KENTUCKY* AND THE RIGHT TO SPEEDY APPEAL TO STATE APPEALS *NUNC PRO TUNC* RESULTING FROM PRIOR FEDERAL COLLATERAL ATTACK EXTENDS THE RETROACTIVITIY RULE BEYOND THE LIMITS OF, AND CONFLICTS WITH, DECISIONS OF THIS COURT AND ANNOUNCES A NEW RULE CONTRARY TO *TEAGUE V. LANE*.

In an outcome one circuit judge deemed appalling, the court of appeals has manufactured a new rule of retroactivity involving state appeals granted *nunc pro tunc* on federal collateral review. Such a drastic reinterpretation of the retroactivity rule and the creation of a new rule regarding appellate delay on *habeas* review deserves this Court's attention.

It is well-settled that "[a] state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, ___ U.S. ___, 114 S. Ct. 948, 953, 127 L. Ed.2d 236 (1994); *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6, 107 S. Ct. 708, 712 n.6, 93 L. Ed.2d 649

(1987); *Allen v. Hardy*, 478 U.S. at 258 n. 1, 106 S. Ct. 2880 n. 1.

The criminal judgment in this case was final on February 6, 1985 for purposes of retroactivity analysis, as respondent had exhausted his state appellate remedies and the time for filing the petition had expired. The presentation of the untimely motion for leave to appeal before the New Jersey Appellate Division and Supreme Court clearly satisfied the exhaustion requirement of 28 U.S.C. §§2253(b) and (c). See, *Bond v. Fulcomer*, 864 F.2d 306, 309-310 (3rd Cir. 1989); *Hull v. Freeman*, 932 F.2d 159, 164-165 (3d Cir. 1991) ("Hull I"); *Simmons v. Beyer*, 689 F. Supp. 432 (1988). Once the defendant's chance to appeal in state court had been waived or exhausted, the state is entitled to respect for the finality of its state judgment beyond the next in a series of endless post-conviction collateral attacks. This result that the conviction and sentence became final in February 1985 for retroactivity purposes reflects *Griffith's* underlying concern with treating similarly situated defendants similarly.

The Third Circuit sought justification of according this "chance beneficiary" relief by determining that respondent was not "similarly situated" with other defendants convicted in 1977 with convictions becoming final before *Batson* was decided because those defendants did not suffer a 13 year delay in appellate review. Aside from the factual miscalculation of the period of "delay," which was not attributable to the prosecution or New Jersey court system during the respondent's first applications in the federal courts, the Third Circuit's attribution of

appellate delay to the prejudice component of *Batson* defies logic: if there had been no "delay" there would be no *Batson* issue, as respondent's direct appeal would have been concluded prior to 1986. Indeed, absent a delay, respondent would not have been entitled to relief even if he could actually demonstrate a *Batson* violation.

Moreover, one must bear in mind that the event which kept Simmons' case alive after the denial of leave to file an untimely appeal in the state courts, a procedural default, was a conditional writ of habeas corpus in a federal collateral proceeding, and that the Appellate Division subsequently granted leave to appeal on a *nunc pro tunc* basis.

So, too, the Appellate Division "emphasize[d] that this [state] appeal was granted on a 'now for then' basis" and explained that

> A rule of retroactivity of later judicial opinions which would include cases such as this where a direct appeal was not taken for many years, with intervening applications which sought post-conviction and *habeas corpus* relief, might result in encouraging non-timely filing of direct appeals in cases where substantial terms of incarceration were imposed, so as to get the benefit of possible subsequent favorable rulings by future appellate courts. (App. H, p. 133a).

This is precisely the result of the Third Circuit's decision in this case, and gives Simmons federal rights denied to a similarly situated defendant. Indeed, in *Griffith* the Court determined that "the integrity of judicial review requires that we apply that [new] rule to all *similar* cases pending on direct review." *Griffith*, 479 U.S. at 323, 107 S. Ct. at 713 (emphasis added). Indeed, the Court noted that Griffith and Brown were tried in May and June of 1984 and Batson was tried in February 1984. *Id.* at 327 n. 13, 107 S. Ct. at 715 n. 13. So, too, the plurality opinion in *Teague v. Lane*, 489 U.S. 288, 300, 109 S. Ct. 1060, 1070, 103 L. Ed.2d 334 (1989) stated that "since a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are *similarly situated.*" (Emphasis added).

The Third Circuit's creation of a right to a speedy appeal in the context of this case results in treating the respondent more favorable than others convicted in 1977 and by relying in its calculus of prejudice — confusing prejudice generally with the prejudice component of *Batson* — a delay in the prosecution of the state *nunc pro tunc* appeal which could not possibly prejudice respondent under *Batson*.

Third Circuit's decision appears contrary to much of Justice Harlan's proposed approaches to the announcement and retroactive application of new constitutional rules on collateral review. Justice Harlan argued that, with two exceptions found not relevant in this case, new rules should not be applied retroactively to cases on collateral review, stating that "[t]he relevant frame of

reference... is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes from which the writ of habeas corpus is made available." *Mackey v. United States*, 401 U.S. 667, 682, 91 S. Ct. 1160, 1175, 28 L. Ed.2d 404 (1971) (concurring in judgments in part and dissenting in part). Addressing the purposes of habeas, Justice Harlan stated:

> Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.

Id. at 682-683, 91 S. Ct. at 1175. Indeed, in order to perform the deterrent function of collateral review, "the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." *Desist v. United States*, 394 U.S. 244, 262-263, 89 S. Ct. 1030, 1040-1041, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting).

Furthermore, the effect of the Third Circuit's decision is to create and announce a new rule in violation of *Teague*. The essential problem confronting the Court is that, *Griffith* itself did not directly address the problem of applying *Batson* to *nunc pro tunc* appeals. Even if we were to find persuasive the apparent determination that the decision in *Griffith* informs the analysis of this issue, it certainly does not follow that it compels the rule now announced by the Third Circuit. Indeed, *Griffith*, "do[es] not speak directly, if at all, to the issue presented here...". *Saffle v. Parks*, 494 U.S. 484, 490, 110 S. Ct. 1257, 1261, 108 L. Ed.2d 415 (1990). The application of *Griffith* to this case, on federal habeas review of a state appeal *nunc pro tunc* resulting from prior collateral attacks on this 1977 conviction after an initial state court denial of leave to file an untimely appeal, itself invokes a new rule of law and is in conflict with the decisions of this Court.

Application of *Griffith* to this case involving a 1977 trial and conviction creates the problem of not treating similarly situated defendants the same. This determination "hardly comports with the ideal of 'administration of justice with an even hand'" as respondent, "one chance beneficiary — the lucky individual whose case was chosen as the occasion for announcing the new principle — enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine." *Hankerson v. North Carolina*, 432 U.S. 233, 247, 97 S. Ct. 2239, 2347, 53 L. Ed.2d 306 (1977) (Powell, J., concurring in judgment) (citation omitted). The Third Circuit's determination, and the confusion and inqeuitable results emanating from this decision, must be rectified by this Court.

B. THE THIRD CIRCUIT'S DECISION REJECTING THE STATE APPELLATE COURT'S DECISION UNDER STATE SUBSTANTIVE AND PROCEDURAL LAW CONFLICTS WITH THE DECISIONS OF THIS COURT.

"As to the role of adequate and independent State grounds, it is well-established principle of federalism that a State decision resting on an adequate foundation of State substantive law is immune from a review in the federal courts." *Wainwright v. Sykes*, 433 U.S. 72, 81, 97 S.Ct. 2497, 2503, 53 L.Ed.2d 594 (1977); *Henry v. Mississippi*, 379 U.S. 433, 447, 85 S.Ct. 564, 567, 13 L.Ed.2d 408 (1965). See, *Michigan v. Long*, 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). Applying this principle in the context of this federal *habeas* review thus "exclude[s] from consideration any questions of State substantive law, and thus effectively bar[s] federal habeas review where questions of that sort are either the only one raised by a petitioner or are in themselves dispositive of his case." *Wainwright v. Sykes*, 433 U.S. at 81, 97 S.Ct. at 2503-2504.

From the State appellate court opinion, (App. H,) it seems clear that that court made a factual determination that a timely objection to the prosecutor's use of peremptory challenges was not made in this case. A federal court must afford such written findings of fact by a state appellate court a presumption of correctness. 28 *U.S.C.* § 2254(d); *Summer v. Mata*, 449 U.S. 539, 546, 101 S.Ct. 764, 769, 66 L.Ed.2d 722 (1981); *Pemberthy v. Beyer*, 19 F.2d 857, 864 (3rd Cir.1994). Thus, contrary to the decision below

in this case, respondent's failure to timely object precludes consideration of his *Batson* claim in this federal *habeas* review.

"Notions of federalism and comity suggest that reasonable state procedural rules are entitled to respect in the federal courts." *United States ex. rel. Caruso v. Zelinsky*, 689 F.2d 435, 441 (3 Cir. 1982); *Wainwright v. Sykes*, 433 U.S. 72, 81, 89, 97 S.Ct. 2497, 2503, 2506, 53 L.Ed.2d 594 (1977). New Jersey procedure requires that a challenge first be raised before the jurors are sworn, or not at all; thus, respondent's failure to timely object amounts to an independent and adequate state procedural bar to consideration of this claim on federal *habeas* review. It is clear that an alternate holding of a state court, relying on a procedural bar, suffices to implicate the procedural default doctrine.

The Third Circuit decision rejected that the state appellate court's decision rested on an adequate state law ground, contrary to the principle that a federal *habeas* court should avoid constitutional questions when an alternative basis for decision fairly presents itself. As it cannot be fairly said that the jury selection process was infected by racial discrimination in this case, it seems particularly disrespectful to resolve any doubts against the propriety of this state court judgment.

Herein, it cannot be asserted that the state appellate court's lack of an express statement of "adequate and independent state grounds" justifies federal *habeas* review of this peremptory challenges claim. It is clear that the failure

to comply with the New Jersey substantive law and procedural rules was an adequate ground. Nor can it be asserted that the state appellate court's decision rested primarily on federal law or was interwoven with such law. There is no mention of federal law in the Appellate Division's opinion on this issue; hence, it "fairly appears" to rest primarily on state law. For those reasons, *certiorari* should be granted.

C. THE THIRD CIRCUIT'S DECISION THAT A *BATSON PRIMA FACIE* SHOWING DID NOT HAVE TO BE BORNE BY RESPONDENT, AND ITS FINDING OF A *PRIMA FACIE* SHOWING, RAISES IMPORTANT AND UNRESOLVED PROBLEMS.

The failure to make timely objection to the prosecution's exercise of peremptory challenges results in a waiver of a *Batson* claim. *Government of Virgin Islands v. Forte,* 806 F.2d 73, 75-76 (3d Cir. 1986). In this case, it is clear that the Appellate Division determined that a timely objection was not made during *voir dire.* "Thus, any inadequacy in this case with respect to a potential *Batson* claim is the direct result of defense counsel's failure to object and not the result of the non-recordation of the *voir dire* proceedings." *United States v. Cashwell,* 950 F.2d 699, 704 (11th Cir.1992).

Moreover, in this case it is clear that respondent's failure to order transcription of the *voir dire* in this case is not fairly borne by the State. The first documented request

for trial transcripts occurred in the request form of May 6, 1986; this request did *not* include transcripts of the jury *voir dire.* Under the New Jersey Rules for appellate practice, the contents of the transcript for a state appeal shall not include the *voir dire;* if a question is raised on appeal with respect to the *voir dire,* the defendant shall specifically order such in the request for transcript. In this case, it was not until the mid-summer of 1988, *after* all parties and the federal and state courts were advised that the court reporter's notes in this case were lost or destroyed, that respondent's sudden request for the jury selection record for appeal was raised.

The burden of protecting, producing and creating a record of relevant facts in support of a claim and *prima facie* case of purposeful discrimination belongs to the defendant who claims that the prosecution struck potential jurors because of their race. *Riddick v. Edmiston,* 894 F.2d 586, 592 n. 7 (3d Cir.1990); *United States v. Sangincto-Miranda,* 859 F.2d 1501, 1520 (6th Cir.1988); *United States v. Esparsen,* 930 F.2d 1461, 1466 (10th Cir.1991). See, *Hall v. Whitley,* 935 F.2d 164, 165 (9th Cir.1991) (failure to provide federal habeas court a transcript of state trial proceedings justifies dismissal where resolution of appeal requires examination of facts at trial); *United States v. O'Brian,* 898 F.2d 983, 985 (5th Cir.1990) (it is appellant's responsibility to order parts of the record which allegedly contain error and failure to do so prevents court from reviewing the claim).

Furthermore, the Third Circuit majority decision in this case erroneously concluded that defendant's burden of

proving a *prima facie Batson* case was established. However, under *Batson* respondent must point to more than the bare fact of the removal of a black venireperson. *Batson* quite clearly requires the defendant to present facts to the federal court which raise an inference that the blacks were struck *because of their race. Batson v. Kentucky,* 476 U.S. 79, 93, 96, 106 S.Ct. 1712, 1721, 1723, 90 L.Ed.2d 69 (1986). See, *United States v. Porter,* 831 F.2d 760, 767-768 (8th Cir. 1987) (defendant's bare reliance on prosecution's use of peremptory challenge to strike one of the two black jurors insufficient to raise inference of discrimination); *United States v. Vasquez-Lopez,* 22 F.3d 900, 902 (9th Cir. 1994) (mere fact of prosecution's peremptory challenge of sole black potential juror failed to establish *prima facie* case).

Batson clearly provides that a defendant must identify facts and circumstances that support the inference of discrimination — including a pattern of strikes or the prosecutor's statement during *voir dire* suggesting a discriminatory purpose. *Batson,* 476 U.S. at 96-97, 106 S.Ct. at 1722-1723. In this case, the record clearly reveals a concern on the part of the court and both trial counsel seeking to uncover and *eliminate* racial prejudice of potential jurors, who would be excused for cause. (Indeed, 75 of the 124 potential jurors were excused for cause.)

Moreover, when evaluating the "susceptibility" of this particular case to racial discrimination, *State v. Butler,* 731 *S.W.*2d 265, 269 (Mo.App.1987), as the majority decision apparently did, the "racial context" of this case provides absolutely no basis for advantage to the prosecution in using peremptory challenges in a

discriminatory manner. While Simmons is black and both his victims, David Doktor and George Marshall, were white, the prosecution's chief witness, David Wilson, is black, as are Mrs. Elsie Bagby and her daughter, Johnetta Bagby, while another witness is Hispanic, Mrs. Delia Garcia, and another is Pakistani. As one Circuit Court of Appeals has stated, "the key witnesses for both sides in this case were black, which would discount any advantage that a discriminating prosecution might perceive in striking blacks from the jury." *United States v. Matthews*, 803 F.2d 325, 332 (7th Cir.1986). The majority opinion was contrary to the principles in *Batson v. Kentucky*, and *certiorari* should be granted.

CONCLUSION

Based upon the foregoing reasons, this petition for *certiorari* should be granted. The determination of the Third Circuit Court of Appeals that *Griffith v. Kentucky*, 479 U.S. 314 (1987) compelled retroactive application of *Batson v. Kentucky*, 476 U.S. 79 (1986) to this state appeal granted *nunc pro tunc* after prior federal collateral attack and grant of *federal habeas* relief due to the newly-minted constitutional deprivation of asserted delay in the prosecution of the state appeal as prejudicing respondent on the *Batson* issue, so far extended the retroactivity rule of this court and itself announced a new rule as to be contrary to the decisions of this Court. The court of appeals disregard for the state court decision based on state substantive and procedural law as being not "adequate" to support its judgment warrants review. Review is also warranted by this Court to clarify the *prima facie* burden

under *Batson* in cases where the jury *voir dire* is not transcribed.

Respectfully submitted,

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